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Supreme Court, U.S.
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No. 00-1045

IN THE

Supreme Court of the United States

TRW, INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether, when construing the start of the two-year limitations period in 15 U.S.C. § 1681p, "liability arises" immediately when the defendant violates its statutory duty, or instead when the plaintiff later suffers – or discovers – actual injury.

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STATUTES INVOLVED

The text of certain key statutes, as they were in effect during the time frame relevant to this action (1994 through 1996), were provided to this Court as an appendix to Respondent's Brief in Opposition to Petition. *See* Br. in Opp. to Pet. at 1; *id.*, App. at 1a-9a. Petitioner TRW Inc. ("TRW") included within the Joint Appendix, however, and in its Brief referred to, "portions of the Act, *as amended*...."[1] Brief for Petitioner[] ("Br.") at 2 (emphasis added); J.A. 32-88. Numerous Fair Credit Reporting Act ("FCRA") provisions contained in the Joint Appendix are anachronistic due to their recent amendment. They are: 15 U.S.C. §§ 1681a, 1681b, 1681c, 1681d, 1681e, 1681g, 1681h, 1681i, 1681k, 1681m, 1681n, 1681q, 1681r, 1681s, 1681s-1, 1681s-2, and 1681t. *Compare, e.g.*, the Consumer Credit Reporting Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended at 15 U.S.C. § 1681 *et seq.* (1999)) (providing in Section 2404 that Sept. 30, 1997 is the effective date of various 1996 amendments), *with* PA 3a (Respondent filed her action below on Oct. 21, 1996), *and* FCRA of 1970, Pub. L. No. 91-508, 84 Stat. 1136 (1970) (text of FCRA as first enacted in 1970, when 15 U.S.C. § 1681p was enacted in its current form). Respondent therefore urges caution when referring to the statutes in the Joint Appendix.

STATEMENT OF THE CASE

On May 31, 1995, while attempting to organize her affairs before giving birth to her second child, Respondent Adelaide Andrews' financial world was turned upside down. On that

1. By apparent mistake, TRW failed to include within the Joint Appendix the text of 15 U.S.C. § 1681o (FCRA Section 617), FCRA's key provision imposing civil liability for negligent noncompliance with the Act. Respondent, in the Appendix to her Brief in Opposition to Petition, provided the text of Section 617 as it was in effect during the time frame relevant to this action. *See* Br. in Opp. to Pet., App. at 9a. The text of Section 617 in its augmented and current form was printed by TRW in the appendix to its Petition. *See* Pet., App. at 79a.

date. she stepped into a "credit reporting" nightmare, when she attempted to refinance her home mortgage, but was humiliatingly unable to do so. Thus began Andrews' initial suffering because of Petitioner TRW Inc.'s failure to abide by the Fair Credit Reporting Act ("FRCA").

In the weeks that followed, Andrews gradually learned that she was an unwitting victim of "identity theft." On October 21, 1996, well within two years of May 31, 1995 (and after prolonged, exasperating dealings with TRW and others), Andrews filed this action in the district court against TRW and another reporting agency, Trans Union Corporation.

Identity Theft: Since at least 1989, the popular media have reported a growing epidemic of "identity theft," a phrase used to describe a range of insidious acts where fraud perpetrators use portions of innocent consumers' indicia of identity to defraud creditors. *See* ER 344-45.[2] One practical effect of any successful identity theft is that an innocent consumer – the one whose indicia of identity are pilfered – is saddled with the perpetrator's credit delinquencies and other serious problems. *See* FED. TRADE COMM'N, ID THEFT: WHEN BAD THINGS HAPPEN TO YOUR GOOD NAME, RESOLVING CREDIT PROBLEMS (FEB. 2001), *available at* http://www.ftc.gov/bcp/conline/pubs/credit/ idtheft.htm#credit (last visited May 30, 2001) (self-help information for identity theft victims).

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2. References to "ER" are to the Excerpts of Record filed in the Ninth Circuit by Andrews (appellant below) on March 26, 1999. References to "SER" are to the Appellee's Supplemental Excerpts of Record filed in the Ninth Circuit by TRW on July 27, 1999. References to "Br." are to TRW's brief on the merits. References to "JA" and "SJA" are to the Joint Appendix and Supplemental Joint Appendix, respectively, which were filed herein (the latter under seal) concurrently with TRW's brief on the merits. References to "PA" are to the appendix to TRW's Pet. for a Writ of Cert. References to "OBA" are to the appendix to Respondent's Brief in Opposition to Petition. References to "Tr." are to the Reporter's Daily Transcript of Proceedings from the August 1998 trial held in the district court below.

Identity theft can have ruinous impacts upon the innocent consumers whose identities are misappropriated. Often, such innocent consumers (1) are routinely denied otherwise well deserved credit, (2) must endure many months or even years of frustrating dealings with hostile credit grantors and bill collectors seeking payment from the wrong person, and (3) must spend substantial time, effort, and often money to determine the scope of the confusion and remedy their plight. *See id.* Apart from the potentially sweeping economic effects of such victimization, the emotional impacts range from great annoyance to profound distress – including depression. *See* ER 351.

Although it is impossible to determine how many of the nation's consumers have fallen victim to identity theft, all indications are that the number has easily reached tens of thousands – if not hundreds of thousands – every year. *See* ER 345-46. Indeed, throughout the early 1990s, TRW was well aware of the explosive epidemic of identity theft. *See* ER 233-38, 264-66, 268 (testimony of former TRW employees and related exhibits). TRW knew for years, for example, that it regularly disclosed "mismatched" or "mixed" personal credit histories (e.g., disclosed the confidential histories of uninvolved, victimized consumers to credit grantors). *See FTC v. TRW Inc.*, 784 F. Supp. 361, 362 (N.D. Tex. 1991) (indicating TRW's failure "to [m]aintain reasonable procedures to prevent the occurrence and reoccurrence of Mixed Files. . . ."). TRW thus knew that its computerized procedures regularly disclosed consumers' confidential credit histories under highly suspicious and inappropriate circumstances. *See* ER 288, 345.

TRW argued in the Ninth Circuit below that FCRA permits any reporting agency to breach an innocent consumer's financial privacy whenever identity theft was afoot. *See* Appellee's Answering Brief, filed July 27, 1999, at 29-32. Essentially, TRW argued that whenever an impostor invoked aspects of another consumer's identity (e.g., supplied the innocent consumer's social security number), the innocent, victimized consumer automatically became sufficiently "involved" in the

underlying credit transaction to justify a financial privacy breach. *See id.* at 32-35. Indeed, TRW argued that Congress effectively desired privacy breaches under such circumstances. *See id.* at 33-35. The district court accepted this legal fiction in granting partial summary judgment below. *See* PA 28a n.9 and accompanying text. The court of appeals rejected TRW's argument, however, and hence restored the entirety of Andrews' FCRA privacy claim. *See* PA 6a-8a.

Thus, throughout the 1990s, TRW was operating against the law. Specifically, TRW gave itself false permission to breach the financial privacy of any consumer who was an apparent target of identity theft. All too often, such privacy breaches were *facilitating* identity theft. *See* ER 348-49. Indeed, reporting agencies' improper disclosures of creditworthy consumers' credit histories are the *sine qua non* of identity theft. But for uncritical privacy breaches by reporting agencies like TRW, identity thieves would have no reason to invoke victimized, creditworthy consumers' identifying information. Invoking such indicia would do the thieves no good; they could not benefit from other consumers' worthy credit histories if reporting agencies were vigilant about withholding such information.

TRW's Breaches of Duty Concerning Andrews: On June 17, 1993, Andrews visited a radiologist's office. Upon arrival, Andrews complied with a request to complete a "Patient Information" form. *See* SJA 46 (completed form). As is typical, the form sought, *inter alia*, Andrews' name, address, date of birth, and social security number, all of which she provided. *See id.* Unbeknownst to Respondent *Adelaide* Andrews, however, the radiologist's receptionist was named *Andrea* Andrews, only by coincidence. *See* SER 909-10. Eventually, *Andrea* Andrews (the receptionist and hereinafter the "Impostor") pilfered Respondent *Adelaide* Andrews' social security number and used it as her own in various commercial transactions, including repeated attempts to obtain credit. *See* ER 121 (Andrews' diary entry upon discovering the Impostor's identity).

In connection with the Impostor's known dealings, TRW allegedly violated certain FCRA statutory duties four times within a six-month period between July 1994 and January 1995. Specifically, TRW disclosed Andrews' confidential credit history to four different paying subscribers who were dealing with the Impostor – including a bank (on July 25, 1994), a cable television company (on September 27, 1994), a department store (on October 28, 1994), and a retail lender (on January 3, 1995). *See* SJA 47-62, 74-75. In connection with each of these privacy breaches, TRW was responding to a credit application submitted to the subscriber by the Impostor, who primarily used her own indicia of identity, but invoked Andrews' social security number. *See, e.g.*, SJA 50 (printout of October 28, 1994 TRW credit disclosure implicating Andrews, reflecting the credit applicant's proffered indicia of identity).

For example, on September 27, 1994, the Impostor applied for a cable television account from Prime Cable of Las Vegas. *See* ER 177. On the Prime Cable credit application, the Impostor used her own identifying information (her own name, her Las Vegas address, etc.), but provided Andrews' misappropriated social security number. *See id.* When Prime Cable purchased from TRW a consumer report concerning the application, TRW disclosed Andrews' confidential financial history, thus facilitating Prime Cable's extension of credit to the Impostor. *See* SJA 75 (TRW's record of disclosing Andrews' confidential credit history). The Impostor apparently paid the charges incurred on this Prime Cable account for a number of months, but then let the account fall delinquent. *See* ER 178-79 (account history from December 8, 1994 to February 25, 1995). By the time Andrews first realized her own consumer reporting problems on May 31, 1995, the Impostor's Prime Cable credit account had been turned over to credit collection agents, who thereafter pursued Andrews for payment. *See* ER 076-83.[3]

3. TRW persistently implies that Prime Cable advanced no credit to the Impostor pursuant to a TRW privacy breach. *See, e.g.*, Pet. at 5 (Cont'd)

Andrews' Discovery and Accompanying Onset of Actual Damages: All was ostensibly well with Andrews until she attempted to refinance her home on May 31, 1995. While meeting with the loan officer in the lending institution on that date, the loan officer obtained an amalgamated consumer report concerning Andrews from another reporting agency (i.e., one consolidating information from several other reporting agencies, including TRW). *See* SER 952-53. Upon reviewing this report, the loan officer told Andrews that she could not refinance her home mortgage because of indications of recent negative credit dealings, which Andrews later learned were based on the Impostor's activities. *See* ER 098-99, 146. So shocked and humiliated by the allegation that she was neither creditworthy nor truthful about her financial dealings, Andrews began to cry at the lending institution. *See* ER 099, 173-74. Later that day, as Andrews tried to rectify the credit reporting problem immediately, she was urged to contact the TRW, Trans Union Corporation, and Equifax Credit Information Services, Inc. (then the three largest consumer reporting agencies) to correct any possible misinformation reflected in their consumer reports. Tr. at 179 (Andrews' trial testimony on August 4, 1998).

Acting on this advice, Andrews immediately contacted all three agencies, and obtained a consumer file disclosure from each. *See, e.g.*, ER 133 (reflecting Andrews' contacting TRW). When she received from TRW its file disclosure, she noted numerous discrepancies and problematic details, including cryptic, unexplained references to inquiries from the four

(Cont'd)
(omitting reference to Prime Cable); Br. at 5-6 (arguing that Prime Cable, as a regulated utility, was *required* to provide cable service to the Impostor). As a regulated utility, however, Prime Cable could have exacted a large, up-front cash deposit from any non-creditworthy consumer, but elected not to do so here after receiving the Impostor's permission to obtain, and then obtaining, a TRW credit report. *See* SER 1051 (under Nevada law, a "reasonable advance deposit . . . may be required"); *see also* ER 177 (noting the Impostor's consent to a TRW credit check).

subscribers described above. *See* SJA 68-80. Andrews promptly informed TRW about these discrepancies, and TRW purported to set about eliminating them. *See* SJA 81.

Unfortunately, however, Andrews was vexed throughout the next year by resurgent problems springing from TRW's and Trans Union Corporation's lax consumer reporting procedures. *See* ER 110-12, 121-22, 137-41. For example, Andrews was hounded by attempts to collect from her on the Impostor's Prime Cable account, which TRW had earlier facilitated. *See* ER 076-83. Andrews was also repeatedly confronted with resurgent misinformation contained in TRW's subsequent consumer reports, which were generated when, for example, Andrews sought credit while changing her place of residence later in 1995 and again in 1996. *See, e.g.*, ER 112-14, 152-53 (diary entries and discovery responses).

Andrews eventually came to realize that, when the reporting agencies' lax procedures violated their duty of care concerning her privacy, the reporting agencies actually facilitated the Impostor's identity theft, which eventually harmed her. *See* ER 108, 113, 122. This realization – and the sustained anger and worry that Andrews experienced because of TRW's repeated privacy breaches – compounded the mental anguish that Andrews first began suffering on May 31, 1995. *See* ER 137-41. Indeed, Andrews' rheumatologist testified to his medical opinion that the stress from Andrews' longstanding frustration with TRW, specifically, seriously exacerbated her pre-existing, chronic medical condition. *See* Tr. at 829-31 (August 8, 1998 trial testimony of Dr. Roy Kaplan).[4]

4. Of the four times that TRW breached Andrews' privacy in violation of its FCRA duties, three did not end in any credit issuance to the Impostor. *See* SJA 47-48, 50-51, 59 (indicating business reasons why credit was denied in each instance). TRW tries to present its privacy violations as therefore inherently innocuous. This argument fails by overlooking, among other matters, the mental anguish that one can suffer upon learning of serial privacy breaches.

The Litigation Below: On October 21, 1996, after more than a year of frustrating dealings with TRW, Trans Union Corporation, creditors, collection agents, and others, Andrews filed suit against TRW and Trans Union in the District Court for the Central District of California. *See* JA 8-20. Concerning TRW's four privacy breaches, Andrews claimed that TRW had violated its statutory duties as set forth in 15 U.S.C. § 1681b(3)(A) and the first and last sentences of 15 U.S.C. § 1681e(a). *See* JA 15-16. Together, these statutes require reporting agencies to follow reasonable procedures, and also to possess reasonably clear factual justification, when disclosing consumers' confidential credit histories. *Cf.* Appellant's Reply Brief, filed September 10, 1999, at 12-18 (explaining FCRA's privacy protections).

On February 23, 1998, TRW moved for partial summary judgment on various aspects of Andrews' claims. *See* SER 793-823. As to the specific question presented here, TRW moved for partial summary judgment on statute of limitations grounds regarding the portion of Andrews' claims arising from TRW's first two privacy breaches (those which occurred slightly more than two years before this action commenced). *See* SER 808-10. Andrews opposed. *See* SER 977-1018; *see also* SER 992-97 (Andrews' argument specifically regarding the statute of limitations issue). The district court granted TRW partial summary judgment as requested, striking Andrews' breach of privacy claims entirely, based on both statute of limitations grounds and the plainly erroneous holding that Andrews was sufficiently "involved" in the Impostor's credit dealings. *See* Pet., App. at 21a-34a. In so doing, the district court invoked, *inter alia*, *Houghton v. Insurance Crime Prevention Inst.*, 795 F.2d 322 (3d Cir. 1986), as grounds for its statute of limitations ruling. *See* Pet., App. at 23a.

Following the district court's partial summary judgment rulings, TRW's co-defendant Trans Union Corporation settled with Andrews. *See* Notice of Settlement (filed July 16, 1998). Andrews then proceeded to trial against TRW with her

remaining, orphaned claim for violation of 15 U.S.C. § 1681e(b), which pertained to the inaccuracy of the TRW consumer reports initiated by Andrews on and after May 31, 1995. Following another series of erroneous pre-trial evidentiary rulings concerning the scope of allowable expert testimony, the remaining inaccuracy claim was tried to a jury, which held for TRW. *See* Judgment on the Verdict (filed August 17, 1998).

Andrews appealed to the court of appeals concerning the statute of limitations ruling, as well as many others. *See* Opening Brief of Appellant at 2-3 (filed March 26, 1999) (listing seven issues presented on appeal); *see also id.* at 49-57 (Andrews' opening limitations argument). The court of appeals reversed the district court's judgment in favor of Andrews on the statute of limitations issue and all but one other issue.[5] *See* PA 9a. In so doing, the court of appeals restored not only the entirety of Andrews' privacy claim, but also her claim for punitive damages based thereon. *See* PA 8a; *see also* SJA 56 (cryptic evidence of TRW's advance consciousness of its privacy violation).

Relevant to the question presented here, the court of appeals below declined to follow *Houghton v. Insurance Crime Prevention Institute* and its ilk, and instead followed by analogy *Englerius v. Veterans Admin.*, 837 F.2d 895 (9th Cir. 1988).

5. On appeal, the Ninth Circuit ruled that the district court's erroneous rulings made in partial summary judgment had further "infected" the district court's pre-trial rulings and led to additional errors concerning the admissibility of certain critical trial testimony. *See* PA 8a-9a. Unfortunately, the Ninth Circuit then deemed all such pre-trial and trial errors "harmless" as they related to the remnant "accuracy" claim, and declined to reverse the district court's judgment based thereon. *See* Pet., App. at 9a. Andrews acquiesces to this aspect of the Ninth Circuit's ruling, although she views it as erroneous under FED. R. CIV. P. 61. *See, e.g., Jordan v. Medley*, 711 F.2d 211, 219 (D.C. Cir. 1983) (Scalia, J.) (analyzing FED. R. CIV. P. 61, and finding no *necessary assurance* that jury's judgment was not substantially swayed by error). *See generally* Appellant's Petition for Rehearing by Panel or En Banc (filed July 28, 2000) (Andrews' argument below about the harm from the district court's pre-trial and trial errors).

See PA 6a (citing *Englerius*, 837 F.2d at 898). Thereupon, the Ninth Circuit held that Andrews' claims concerning TRW's four separate privacy breaches were not barred by the statute of limitations, and remanded the claims for trial. *See id.* ("Andrews' claims were not barred.").

SUMMARY OF ARGUMENT

When construing FCRA's statute of limitations, 15 U.S.C. § 1681p (hereinafter "Section 618"), this Court should choose one of two reasonable constructions. Under either one, Andrews' privacy claims should go forward *in toto*.

First, this Court may – and Andrews respectfully submits should – apply the traditional "injury discovery" accrual rule, which is generally applied by the federal courts. The "injury discovery" accrual rule "postpones the beginning of the limitations period" until a plaintiff actually or constructively "discovers that he has been injured." *Cada v. Baxter Heathcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990). Section 618's plain language literally expresses such an accrual rule. Specifically, Section 618 provides that FCRA's two-year limitations period starts running when liability "arises." Liability "arises" only when injury is *suffered*. *See, e.g., Jamison v. Encarnacion*, 281 U.S. 635, 641 (1930) ("[L]iability arises [only] when one *suffers injury* as a result of any breach of duty owed to him by another. . . ." (emphasis added)). Moreover, since 1949, this Court has consistently articulated and applied the "injury discovery" accrual rule in a variety of contexts, whether the injuries were individual or corporate, bodily or not. Given the "injury discovery" accrual rule's fundamental fairness, this Court should affirm its applicability to all amenable federal limitations provisions – including Section 618.

Second, this Court might instead choose to apply a relatively restrictive "injury occurrence" accrual rule here. If so, the "injury" that must occur for the limitations period to start running is one constituting *actual damages*. *See* 15 U.S.C. § 1681o (providing that actual damages are the *sine qua non* of liability

for negligent noncompliance with FCRA). Therefore, at an absolute minimum, Section 618 requires an "actual injury occurrence" accrual rule, which contrasts sharply with TRW's recommended "violation occurrence" accrual rule. *See Hyde v. Hibernia Nat'l Bank*, 861 F.2d 446, 448-49 (5th Cir. 1988) (applying an "actual injury occurrence" rule to Section 618, and expressly rejecting defendant's recommended "violation occurrence" accrual rule), *cert. denied sub nom. Credit Bureau Services – New Orleans v. Hyde*, 491 U.S. 910 (1989).

Here, wholly apart from questions about discovery, Andrews incurred no actual injury until May 31, 1995, when she first became embroiled in her credit reporting ordeal. Because Andrews filed suit in October 1996, she brought this action well within the two-year limitations period. Accordingly, even if this Court were to apply a relatively restrictive and less traditional "injury occurrence" accrual rule here, it should nonetheless affirm the Ninth Circuit's judgment below.

Section 618's history reveals that Congress deliberately rejected TRW's recommended "violation occurrence" accrual rule. When enacting FCRA, Congress drafted, deliberated, and then *discarded* plain language that would have commenced the limitations period immediately upon a potential defendant's behind-the-scenes "violation" of FCRA duties. In so doing, Congress made ample room for judicial application of the "injury discovery" accrual rule, or, at minimum, an "actual injury occurrence" accrual rule.

Congress also affixed a special "misrepresentation exception" to Section 618's primary provision. This exception applies only to a particularly egregious type of misconduct, where a potential defendant reporting agency willfully misrepresents to a consumer either facts or its legal obligations concerning its extant FCRA liability. In such instances, the special exception operates to *extend* the limitations period indefinitely until the falsity of the willful misrepresentation is revealed. Therefore, this special exception provisionally adds

to the time within which a diligent consumer may bring suit *after accrual*. The special exception thus comports with and complements any relevant accrual rule, be it the generally accepted "injury discovery" or the more restrictive "actual injury occurrence" accrual rule.

FCRA's related "notice and access" provisions similarly comport with the application here of either an "injury discovery" or an "actual injury occurrence" accrual rule. As important as those related provisions are, they fail to provide a potential FCRA plaintiff with sufficient information upon which to base a FCRA lawsuit. FCRA does not impose strict liability. As a result, any potential FCRA plaintiff might need the full two-year limitations period *after* injury arises to investigate the merits of a potential lawsuit.

Sound policy considerations support the conclusion that Section 618's limitations period should start no sooner than when a potential plaintiff discovers an injury, or reasonably should have done so. This Court should readily dismiss TRW's intimation that reading an "injury discovery" accrual rule within Section 618 would expose defendants to tardy litigation for decades. FCRA's limited consumer "notice and access" provisions, when coupled with the "injury discovery" accrual rule, will provide very swift closure in almost all cases. While it may be sound policy to establish an exact limit to how long after a defendant's statutory violation a plaintiff may bring a FCRA action, such is for Congress to decide.

ARGUMENT

I. ANDREWS' INITIAL DISCOVERY OF HER INJURIES SHOULD TRIGGER THE ACCRUAL OF HER FCRA CLAIMS.

A. FCRA Liability "Arises" Only When It Springs Up, Comes into Notice, or Presents Itself to the Consumer.

Statutory interpretation begins with the statutory language itself. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). When interpreting and applying a statute of limitations, one "must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of rights given by the Act." *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 427 (1965). Section 618's primary provision reads: "An action to enforce liability created under [FCRA] may be brought . . . within two years of the date on which the liability arises. . . ." Therefore, this Court must first address the question: "Exactly when does liability 'arise' under FCRA?"

The term "arises" commonly refers to a "springing up," "coming into notice," or presentation – hence, a *manifestation*. *See* 1 THE OXFORD ENGLISH DICTIONARY 629 (2d. ed. 1989) (defining "arise" as "to spring up, come into . . . notice, 'come up,' present itself"). Applying this common meaning of "arises" to Section 618, the statute literally expresses a discovery accrual rule. *See, e.g., Old Colony R.R. v. Commissioner*, 284 U.S. 552, 560 (1932) (holding Congress presumptively uses words in their known and ordinary sense). Indeed, from Andrews' point of view, not one element of TRW's alleged liability sprang up, came into notice, came up, or presented itself before May 31, 1995, when she first discovered any credit problem. Accordingly, this Court need do no more than apply an appropriately common definition to the term "arises" to affirm the judgment below. As shown below, this definition and the result that it achieves comport with both legal tradition and this Court's specific precedents.

B. The "Injury Discovery" Accrual Rule is Firmly Rooted in the Universal Maxim That No Prescription Shall Run Against One Who Cannot Bring an Action.

Putting aside unusually harsh statutes of limitations which are expressly keyed to defendants' wrongful acts (regardless of how belatedly or latently harmful), courts have generally recognized that plaintiffs' rights and remedies co-exist. *See, e.g., Hanger v. Abbott*, 73 U.S. (6 Wall) 532, 542 (1867)

("Peace restores the right and the remedy, and . . . that cannot be if the limitation continues to run during the period the [plaintiff] is rendered incapable to sue. . . ."). Accordingly, this Court has long ago acknowledged as a "maxim of universal justice" that "*contra non valentem agere non currit prescriptio*" – i.e., no prescription runs against one who is unable to bring an action. *See Levy v. Stewart*, 78 U.S. (11 Wall) 244, 254 (1870) (acknowledging and applying maxim).

This Court has also recognized the distinct principle that no plaintiff may bring suit *before* first being presented with actionable damages. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971) ("[T]he cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them. . . ."). By considering these two principles together, one can easily see the harshness and unreasonableness of eroding a brief limitations period before any action could possibly be brought. Accordingly, courts have increasingly recognized the "injury discovery" accrual rule, particularly over the last century. *See, e.g., Marsh v. Industrial Accident Comm'n*, 217 Cal. 338, 345-51 (1933) (discussing and following various states' earlier adoption of the "injury discovery" accrual rule in the context of workers' compensation).[6]

6. As *Marsh* and the cases cited in it show, commentators who claim that the "injury discovery" accrual rule first developed in the 1950s are mistaken. TRW and various courts, including this Court in *Rotella v. Wood*, have cited to such a commentator, Professor Corman. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000) (citing I Corman, *Limitations* § 6.5.5.1); Br. at 13-15, 24, 39 (citing, e.g., II Calvin C. Corman., *Limitations of Actions* § 11.2.1, at 136-39). Professor Corman's treatise contains various errors and inaccuracies. For example, Corman writes that this Court's opinion in *Bailey v. Glover*, 88 U.S. (21 Wall) 342 (1874) (a landmark case concerning equitable discovery principles) was decided a century later, in 1974, and specifically following this Court's opinion in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). *See* II Corman, *Limitations*, § 11.5.4. Similarly,

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C. As Early as 1949, This Court Articulated and Applied the "Injury Discovery" Accrual Rule While Construing a Federal Statute of Limitations.

This Court first clearly articulated and applied the "injury discovery" accrual rule in *Urie v. Thompson*, 337 U.S. 163 (1949). There, in the context of workers' compensation, this Court reasoned that the plaintiff could not be expected to have acted upon what was "unknown and inherently unknowable" and "had not yet obtruded on his consciousness." *Id.* at 169. Emphasizing that the plaintiff had been "blamelessly ignorant" of his injury, this Court concluded that his claim did not accrue until the injury came into notice, or presented itself. *See id.* at 170. Specifically, this Court stated that commencing the statute of limitations before the injury's presentation could not "be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time *after notice* of the invasion of legal rights." *Id.* (emphasis added). Thus, the plaintiff "can be held to be 'injured' only when the . . . effects . . . manifest themselves." *Id.*[7]

Thirty years later, this Court's willingness to adopt a much more expansive discovery accrual rule was tested in *United States v. Kubrick*, 444 U.S. 111 (1979). In *Kubrick*, this Court ruled that accrual for limitations purposes need not await the

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Professor Corman repeatedly conflates the injury discovery accrual rule with equitable estoppel. *See id.* §§ 11.1.3 n.27, 11.1.4 n.44, 11.1.5 n.72. Accordingly, Andrews urges reading all relevant treatises critically, given that the only modern treatise available contains errors. *See Wolin v. Smith Barney Inc.*, 83 F.3d 847, 849 (7th Cir. 1996) (lamenting the paucity of "sustained scholarly attention" afforded the law concerning statutes of limitations).

7. In *Urie*, four Justices concurred "in part." *See* 337 U.S. at 196-97 (Frankfurter, J., concurring in part). Those Justices indicated no disagreement with the majority's accrual rule. *See id.* ("Damages are recoverable under the Act for *suffering* 'injury.'" (emphasis added)). Hence, this Court in *Urie* was seemingly unanimous in its approval of the "injury discovery" accrual rule.

actual or constructive discovery of *all* of the elements of a claim (*i.e.*, duty, breach, causation and injury). *See id.* at 123-24. Balking at such an "all elements discovery" accrual rule, this Court explained:

> A plaintiff . . . , *armed with facts* about the harm done to him, can protect himself by seeking advice. . . . To excuse him from [then] promptly doing so by [further] postponing the accrual of his claim [after being armed with those facts] would undermine the purpose of the limitation statute, which is to require the reasonably diligent presentation of tort claims. . . .

Id. at 123 (emphasis added). Indeed, this Court in *Kubrick* articulated an "injury *and causation* discovery" accrual rule.[8] *Id.* at 122 ("[F]acts about causation may be in control of the putative defendant, unavailable to plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who inflicted the injury.").[9] The three dissenting Justices in *Kubrick* favored an accrual rule that is even *more* expansive than that articulated by the Court; they favored an "all elements

8. Perhaps the true question presented here is: "Will this Court now distance itself from the more expansive "injury and causation discovery" accrual rule that it articulated in *Kubrick* – and, if so, how far, and why?"

9. In some other countries, statutes of limitations start running only when the plaintiff discovers both injury and its causation. In the Federal Republic of Germany, for example, the longstanding statute of limitations generally applicable to torts contains a three-year limitations period that starts running only when the plaintiff gains knowledge of both his injury *and who caused it*. *See* § 852 Absatz 1 Bürgerliches Gesetzbuch (BGB) (providing also, so as to assure ultimate repose, that no claim may be brought more than thirty years after the defendant's damaging action).

discovery" accrual rule. *See id.* at 125-26 (Stevens, J., dissenting).[10] Moreover this Court in *Kubrick* seemingly recognized that the accrual rule that it selected there would apply thereafter to myriad federal laws. When explaining its rejection of the "all elements discovery" accrual rule preferred by the dissenting Justices, this Court wrote, "[I[t would be difficult indeed not to apply the same accrual rule . . . to a whole range of negligence cases under the Act and other federal statutes. . . ." *Id.* at 124.[11]

10. On a continuum from the most expansive accrual rule to the least, there are (1) the "all elements discovery" accrual rule, championed by the dissent in *Kubrick*, followed by (2) the "injury and causation discovery" accrual rule, upon which this Court settled in *Kubrick*. Next is (3) the "injury discovery" accrual rule that is now generally applied by federal appellate courts. *See Cada v. Baxter Heathcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) (citing numerous federal appellate courts' adoption of the "injury discovery" accrual rule). Next in turn is (4) the "injury occurrence" accrual rule, which was recently recognized in dicta by this Court. *See Rotella v. Wood*, 528 U.S. 549, 554 n.2 (2000). Last on this continuum is (5) TRW's recommended "violation occurrence" accrual rule, by which a cause of action accrues immediately when a potential defendant breaches its duty, irrespective of the deferral or discovery of any injury.

11. Writing for the dissent in *Kubrick*, Justice Stevens indicated that "a claim might be deemed to 'accrue' at the moment of injury without regard to the potential harsh consequence" in "most commercial situations." 444 U.S. at 126 (Stevens, J., dissenting) (citing *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975) (construing Illinois law)). The Seventh Circuit in *Gates Rubber Co.* was careful to indicate, however, that it declined to apply the "injury discovery" accrual rule there *not* merely because commerce was involved, but because the parties there were both commercial titans of equal strength, who were operating under a contract. *See Gates Rubber Co.*, 508 F.2d at 605, 613-14 (describing the underlying facts and their import); *see also id.* at 614 ("For in Illinois, at least *when contracts between parties of relatively equal bargaining strength are being construed*, the risk . . . of negligence is treated like any other commercial risk. . . ." (emphasis added)). At the same time, the Seventh Circuit in *Gates Rubber Co.* recognized that Illinois law applied an "injury discovery" accrual rule

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Since *Kubrick*, federal appellate courts have uniformly embraced the "injury discovery" accrual rule as a minimum accrual standard. *See, e.g., Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 341-43 (D.C. Cir. 1991) (applying the "injury discovery" accrual rule); *Cada v. Baxter Heathcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) (sampling various circuit courts' applications of the "injury discovery" accrual rule); *cf. American Tobacco Co. v. People's Tobacco Co.*, 204 F. 58, 61-63 (5th Cir. 1913) (applying a discovery rule to a Sherman Act violation, concluding, "No action could be brought until . . . [the corporate plaintiff] had knowledge of the facts which gave him a cause of action."). Here, Andrews discovered no injury – indeed, she discovered *nothing* concerning TRW's possible FCRA liability – until May 31, 1995. *Supra* pp. 6-7. She filed this action on October 21, 1996. *Supra* p. 8. Applying the "injury discovery" accrual rule here would allow this Court to affirm the judgment below.

D. This Court Has Articulated and Applied the "Injury Discovery" Accrual Rule to Various Types of Injuries – Individual and Corporate, Bodily and Otherwise.

This Court recently indicated that "the cry for a discovery [accrual] rule is loudest" when there is medical malpractice. *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Indeed, this Court's 1979 decision in *Kubrick v. United States* concerned a claim for medical malpractice. *See* 444 U.S. at 113-15. Somewhat similarly, this Court's 1949 decision in *Urie v. Thompson* concerned a plaintiff's discovery of an occupational disease, silicosis, which affects the pulmonary system. *See* 337 U.S. at 165-66. This Court has not, however, limited its application of the "injury discovery" accrual rule to cases involving latent bodily injuries. Instead, this Court has also articulated and applied the same "injury discovery" accrual rule regarding strictly economic damages suffered by a corporation.

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to claims brought by consumers, noting that "rules [that] had been developed to meet the needs of commercial transactions were inadequate to afford the necessary consumer protection." *Id.* at 609-10.

Specifically, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), this Court had the opportunity to consider issues related to the running of the Clayton Act's statute of limitations. *See* 401 U.S. at 338-42. In *Zenith*, this Court wrote the following sentence: "Generally, a cause of action accrues and the statute of limitations begins to run when a defendant commits an act that injures a plaintiff's business." *Id.* at 338. It then cited authorities indicating that accrual occurs no sooner than when an actionable injury is suffered. *See Zenith*, 401 U.S. at 338 (citing *Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd.*, 185 F.2d 196, 208 (9th Cir. 1950) (indicating that accrual must await injury), *Bluefields S.S. Co. v. United Fruit Co.*, 243 F. 1, 20 (3d Cir. 1917) (same), and *2361 State Corp. v. Sealy, Inc.*, 263 F. Supp. 845, 850 (N.D. Ill. 1967) (same)).

Later in the same paragraph, this Court provided the following clarifying example, articulating the "injury discovery" accrual rule precisely:

> Thus, if a plaintiff *feels* the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred *by* [*i.e., on or before*] that date and all provable damages that will flow in the future from acts of the conspirators on that date.

Zenith, 401 U.S. at 339 (emphasis added).

Hence, this Court in *Zenith* recognized that a Clayton Act cause of action does not accrue until the plaintiff *feels* (i.e., *consciously suffers*) an injury. Upon initially *feeling* an injury, the plaintiff can then bring suit for, *inter alia*, all damages incurred *by* the time thereof, which indicates that actionable injury could occur *before* the accrual, but remain unnoticed until then. Therefore, this Court's opinion in *Zenith* very clearly

articulates the "injury discovery" accrual rule – once again without dissent, just as it had in *Urie* more than twenty years earlier.[12]

TRW erroneously relies on the sentence from *Zenith* (the first one quoted above) to argue that Section 618's limitations period starts running immediately upon a defendant's wrongful act or violation of its duty of care. Br. at 11, 15, 42. TRW thus implies that this Court in *Zenith* held that causes of action generally accrue as soon as the respective defendant commits a *potentially* damaging act, even though damage might not result until some later time.[13] TRW has simply read out of context

12. In *Zenith*, two Justices concurred in the result while finding it "unnecessary to express any view on the . . . difficult issues" that the Court discussed. *See Zenith*, 401 U.S. at 349 (Harlan, J., concurring).

13. TRW cites two federal cases for the proposition that the laws of two states (Maryland and Georgia), more than thirty years ago, did not embrace the injury discovery accrual rule and, instead, construed statutes of limitations most restrictively. *See* Br. at 15 (citing *Atwell v. Retail Credit Co.*, 431 F.2d 1008 (4th Cir. 1970) (applying Maryland law) and *Peacock v. Retail Credit Co.*, 302 F. Supp. 418, 422 (N.D. Ga. 1969) (applying Georgia law)). But see, for example, *Cigna Ins. Co. v. Oy Saunatec, Ltd.*, 241 F.3d 1 (1st Cir. 2001):

> Both Rhode Island and Massachusetts . . . have adopted a discovery rule . . . governing the accrual of causes of action in which an injury or its cause is inherently unknowable. The discovery rule prevents the cause of action of an injured plaintiff from accruing until the plaintiff learns, or reasonably should have learned, that he has been harmed by the defendant's conduct.

Id. at 10-11 (citations and quotations omitted).

TRW also cites to 50 Am. Jur. 2d, *Libel and Slander* § 390 (1970) for historical legal notions concerning defamation generally. A more current version of that same authority explains that a discovery accrual rule should apply generally to latent causes of action for defamation – and specifically to causes of action against credit reporting agencies. *See* 50 Am. Jur. 2d, *Libel and Slander* § 421 n.9 and accompanying text (1995).

the one sentence from *Zenith*, ignoring the accompanying citations and – more importantly – the helpful, clarifying example that follows.[14]

Importantly, in *Zenith*, there was no bodily injury, as there was in *Urie* and later in *Kubrick*. The plaintiff in *Zenith* was a corporation that had suffered only lost sales and profits. *See Zenith*, 401 U.S. at 323 ("The difference between the profits it actually made and the profits it would have made . . . was the measure of damages demanded."). Accordingly, this Court's precedents do not limit application of the "injury discovery" accrual rule to specific types of plaintiffs or to physical injuries.

Finally, one could argue that Section 618 must be strictly construed because it contains reference to the jurisdiction of courts. *Compare* Section 618 (referring to jurisdiction of courts), *with Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1039-41 (D.C. Cir. 1986) (discussing the construction of "jurisdictional" statutes of limitations). Even if so, equitable discovery principles apply to strictly construed statutes of limitations. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (holding that strict construction of statutes of limitations does not rule out application of equitable tolling). Indeed, writing in *Cada v. Baxter Healthcare Corp.*, the Seventh Circuit was careful not to indicate that the jurisdictional nature of a statute of limitations would bar application of the "injury discovery" accrual rule. *See* 920 F.2d at 451 ("Neither [equitable

14. In *Klehr v. A. O. Smith Corp.*, 521 U.S. 179 (1997), Justice Scalia, joined by Justice Thomas, filed a concurrence in which they invoked the same sentence from *Zenith* which TRW quotes here. *See* 521 U.S. at 198 (Scalia, J., concurring). Quoting that one sentence specifically, these Justices opined: "[O]f the four main accrual rules (injury, injury and discovery, injury and pattern discovery, and last predicate act), the appropriate accrual rule is the Clayton Act 'injury' rule. . . ." *Id.* (dismissing the "injury and discovery" accrual rule). It appears plausible that the concurrence in *Klehr* may not have considered the clarifying example set forth in this Court's *Zenith* opinion. If so, Andrews respectfully asks this Court to consider returning to its historical unity concerning the "injury discovery" accrual rule.

tolling nor equitable estoppel – in distinction to the injury discovery rule] applies to a jurisdictional statute of limitations.").[15] Therefore, Section 618 is amenable to application of the "injury discovery" accrual rule, notwithstanding strict construction.

II. AT THE EARLIEST, SECTION 618's LIMITATIONS PERIOD STARTS RUNNING ONLY WHEN "LIABILITY EXISTS," WHICH REQUIRES THE COALESCENCE OF ALL ELEMENTS OF LIABILITY, INCLUDING "ACTUAL DAMAGES."

A. Even if One Assumes Arguendo That the "Injury Discovery" Accrual Rule Cannot or Should Not Apply, Liability "Exists" Under FCRA's Negligence Provision Only if and When One Suffers "Actual Damages."

Returning to the principle that statutory interpretation begins with the statutory language itself, Andrews acknowledges that the word "arises," as set forth in the phrase "liability arises," may be somewhat ambiguous. Specifically, although the word "arises" commonly refers to a "springing up," "coming into notice," or presentation (hence, a manifestation), it can alternatively mean "comes into existence. . . ." *See* 1 THE OXFORD ENGLISH DICTIONARY 629 (2d. ed. 1989). If one applies this alternative definition, liability "arises" under FCRA when it first comes into existence, irrespective of its deferred presentation. Assuming arguendo that this alternative definition of "arises" applies to Section 618,

15. The Seventh Circuit decided *Cada* just ten days after this Court decided *Irwin*. *Compare Irwin*, 498 U.S. 89 (decided Dec. 3, 1990), *with Cada*, 920 F.2d 446 (decided Dec. 13, 1990). It appears, however, that the Seventh Circuit in *Cada* had not fully digested *Irwin*. Specifically, in *Cada*, the court of appeals indicated – quite contrary to this Court's holding in *Irwin* – that equitable tolling cannot apply to jurisdictional statutes of limitations. *Compare Irwin*, 498 U.S. at 95-96 (holding that strict construction of jurisdictional statutes of limitations does not rule out equitable tolling), *with Cada*, 920 F.2d at 451 (after citing *Irwin*, ruling exactly the opposite).

the next logical question should be: "What conditions are required for 'liability' to 'exist' under FCRA, thus commencing its limitations period?"

The term "liability" can have a broad variety of meanings. *See* BLACK'S LAW DICTIONARY 914 (6th ed. 1990) (defining liability very broadly). Consistent with cardinal principle, however, no liability exists under FCRA – and no cause of action accrues – unless and until all necessary elements of a statutory cause of action coalesce: duty, breach, causation, and *injury*. *See Rotella v. Wood*, 528 U.S. 549, 558 n.4 (2000) ("cardinal principle that a cause of action does not begin to run until the cause of action is complete"); *Jamison v. Encarnacion*, 281 U.S. 635, 641 (1930) ("[L]iability arises when one *suffers injury* as a result of any breach of duty owed to him by another. . . ." (emphasis added)).

Under FCRA, "liability" is expressly and narrowly defined. Pursuant to FCRA's principal liability provision, 15 U.S.C. § 1681o, civil liability for negligent noncompliance exists only where "*actual damages* [are] sustained by the consumer as a result of the [defendant's] failure" to comply with FCRA. 15 U.S.C. § 1681o (emphasis added). Thus, under FCRA, no liability arises before the consumer realizes actual damages.[16] *See, e.g.*, *Kates v. Crocker Nat'l Bank*, 776 F.2d 1396, 1397 (9th Cir. 1985) (related FCRA provisions should be read together).

16. TRW cites a 1983 law review article to suggest that, historically, defamation claims accrued upon publication (i.e., upon the defendant's violation), irrespective of a plaintiff's injury or its discovery. *See* Br. at 33 (citing Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95, 99-100 (1983)). The same commentary confirms, however, that Congress changed the law from the status quo ante by making actual damages the *sine qua non* for negligent FCRA violations. *See* 72 Geo. L.J. at 121-23 (discussing the actual damages requirement for FCRA liability). Thus, TRW's chosen authority undermines its argument.

Here, Andrews realized no actual damages prior to May 31, 1995 – the date on which she first discovered TRW's violations or, more accurately, suffered any effects because of them. Only then were her potential, unrealized damages transformed into actual damages. Simply put, because Andrews had not yet suffered actual injury, *she had no FCRA claim to bring before May 31, 1995.*[17]

Because Andrews possessed no FCRA claim before May 31, 1995, it would be an "odd result" for this Court to find that FCRA's limitations period began running before her claim had accrued.

> While it is theoretically possible for a statute to create a cause of action that accrues at one point in time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, *we will not infer such an odd result* in the absence of such indication in the statute.

Reiter v. Cooper, 507 U.S. 258, 267 (1993) (emphasis added). In enacting FCRA, Congress gave no indication that it wanted FCRA's limitations period to start running before a claim accrues.[18]

17. In reply, TRW may claim that a consumer immediately suffers actual damages whenever a reporting agency violates his or her privacy rights, behind the scenes and unbeknownst to the consumer. This attenuates the meaning of actual damages. Although any privacy violation is itself condemnable and *potentially* very injurious, the unwitting victim suffers no actual damages unless and until some personal realization occurs, usually through discovery. Because the statutory right of action for any negligent FCRA violation requires actual damages, mere metaphysical legal detriment or inchoate, potential damages will not suffice. *Cf. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998) ("[Where] [t]he language is straightforward, and with a straightforward application ready at hand, statutory interpretation has no business getting metaphysical.").

18. TRW might argue that FCRA liability can, in some rare cases, arise before any actual injury, because 15 U.S.C. § 1681n allows both actual and punitive damages for any willful violation of FCRA. *See* 15 U.S.C § 1681n (as originally enacted and in effect during the years relevant to this case, reprinted at OBA 8a). From there, TRW may note that punitive damages could hypothetically attach immediately upon willful wrongdoing, thus triggering the start of Section 618's limitations period. Given this scenario, however, a different discovery rule should apply, based upon venerable equitable tolling principles. Equitable tolling is invoked when the would-be plaintiff cannot, despite reasonable diligence, obtain information essential to bringing suit. *See Wolin v. Smith Barney Inc.*, 83 F.3d 847, 851-52 (7th Cir. 1996) (discussing the applicability of equitable tolling where "the defendant has made no special effort to cover up"); c*f. United States v. Kubrick*, 444 U.S. at 123-24 (after discovering certain elements, a would-be plaintiff must then exercise reasonable diligence to investigate claim for actionable negligence). Indeed, for centuries, courts have maintained that they "will not encourage, nor in any manner protect[,] the abuse of confidence, and therefore no length of time shall bar a fraud; . . . unless it appears that the circumstances of the fraud were known to the party. . . ." JOHN FONBLANQUE, TREATISE OF EQUITY 244-46 (E. Merriam & L. Merriam eds., 4th ed. 1835). *Accord Bailey v. Glover*, 88 U.S. (21 Wall) 342, 349-50 (1874) (discussing equitable tolling where the wrongdoing "is of such character as to conceal itself"); *Willison v. Watkins*, 28 U.S. (3 Pet.) 43, 52-53 (1830) (discovery accrual rule applies to any fraud or breach of trust); *Epstein v. United States*, 174 F.2d 754, 765-66 (6th Cir. 1949) (defining constructive fraud as any breach of confidence). Of course, it would be the height of inequity to reward a defendant for willfulness in violation by accelerating accrual and thereby effectively truncating the plaintiff's limitations period.

Hence, even if one were to afford the term "arises" an uncommonly broad meaning, so as to avoid applying the "injury discovery" accrual rule to Section 618, one should not then also afford the term "liability" a similarly broad meaning, so as to avoid an "actual injury occurrence" accrual rule. Only by giving unduly broad definitions to *both* of the terms – "liability" and "arises" – could one arrive at the "violation occurrence" accrual rule that TRW recommends here. As shown below, Congress deliberately rejected a "violation occurrence" accrual rule when it enacted Section 618.

B. Specific Textual Changes Made When Congress Drafted Section 618 Indicate That Its Limitations Period Does Not Start Running Merely Upon the Violation of a Statutory Duty.

Reading Section 618 with FCRA's principle liability provision thus compels the conclusion that "liability arises" under FCRA only when actual injury is complete, at the earliest. TRW argues instead that Section 618's history reveals Congressional intent to enact an exceptionally restrictive statute of limitations – one which starts running upon a mere *violation* of statutory duty of care – coupled with a special misrepresentation exception. Br. at 36-37. In so doing, TRW ignores the most telling evidence that Congress intended otherwise. Plain language that would have commenced Section 618's limitations period upon the mere "violation" of FCRA duties was drafted, deliberated, and then discarded by Congress – only to be replaced by the "liability arises" language.

FCRA was first introduced in the Senate in 1969. *See* S. 823, 91st Cong., 115 CONG. REC. 2415-16 (Jan. 31, 1969). The bill would have prescribed an extremely restrictive two-year statute of limitations reflecting a "violation occurrence" rule. *See id*; *see also* 116 CONG. REC. 32641 (Sept. 18, 1970) ("Any action under [FCRA] may be brought . . . within two years from the date of the occurrence of the violation."). Had it ever become law, this language would have keyed the start of FCRA's limitations period to the date of a defendant's allegedly wrongful act.[19]

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19. From time to time, Congress has enacted consumer-protection statutes with limitations periods commencing specifically upon the date of the occurrence of a violation. *See, e.g.*, 15 U.S.C. §§ 1640(e) (Truth in Lending Act) (keying the start of its limitations period to the date of occurrence of a violation, in contradistinction to FCRA as ultimately enacted); 1679i(1) (Credit Repair Organizations Act) (same), 1691e(f) (Equal Credit Opportunity Act) (same), 1692k(d) (Fair Debt Collection Practices Act) (same), and 1693m(g) (Electronic Funds Transfer Act) (same).

During 1969 and 1970, however, the House considered competing proposals for governing the credit reporting industry.[20] The House favorite, H.R. 16340, would have provided a relatively expansive, five-year limitations period – albeit, like the Senate bill, keyed to the date of violation. *See* H.R. 16430, 91st Cong., 116 CONG. REC. 6200 (Mar. 5, 1970) (Section 27, Jurisdiction of Courts, Limitation of Actions, "Civil actions may be brought . . . within 5 years of the violations.").

Eventually, the Senate's bill was attached as an amendment to a non-germane House bill. *See* 116 CONG. REC. 32638 (Sept. 18, 1970). Congressional conferees then met and refashioned FCRA into its final form. *See id.* at 34149 (Sept. 29, 1970) (House conferees selected); *id.* at 35843 (Oct. 8, 1970) (conference report). When FCRA emerged from conference, it contained a new and different Section 618. No longer was it keyed to the date of "the occurrence of the violation." Instead, it was keyed to when "liability arises," with a special exception for rare misconduct – where a defendant willfully misleads a would-be plaintiff concerning its extant liability. "A 2-year statute of limitations *from the date liability arises* is provided, except that where the defendant has willfully misrepresented information material to the establishment of . . . [its potential] liability, the statute does not begin to run until discovery of such a misrepresentation." 116 CONG. REC. 36573 (Oct. 13, 1970) (Rep. Sullivan's explanation of final act) (emphasis added).[21]

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20. *See, e.g.*, 115 CONG. REC. 33824 (Nov. 12, 1969) (introduction of H.R. 14765); 116 CONG. REC. 6200-01 (Mar. 5, 1970) (introduction of H.R. 16340 by Rep. Sullivan); *id.* at 7796 (Mar. 17, 1970) (support for H.R. 16340 from author of the earlier bill).

21. TRW is not helped by the fact that the conferees added the misrepresentation exception to Section 618. Congress could have, and presumptively would have, maintained the reference to "the occurrence of the violation" when it added the misrepresentation exception if it had intended TRW's recommended construction; but Congress did not. Indeed, the fact that Congress rejected the more restrictive "occurrence

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An obvious explanation for Section 618's ultimate language is that Congress compromised by choosing a more accommodating *type* of statute of limitations. The ultimate statute is neither the two-year, most restrictive type of "violation occurrence" statute sought by the Senate, nor the five-year, but otherwise similar, statute favored by the House. Rather, the final enactment suggests a moderate bridging of the difference between the two houses of Congress. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation and quotation omitted).

TRW's reaction to Congress' rejection of the "occurrence of the violation" language, and its substitution of the "liability arises" language, is to argue that "some [recorded] discussion of the transformation would be expected." Br. at 37-38. Mustering evidence of Congressional intent concerning FCRA is difficult, however, due to FCRA's transformation in conference. Regarding the transformation, one Senator commented: "Interpretations of amendments accepted by the Senate in conference cannot properly . . . mean other than the meaning discussed and agreed to by the conferees in the conference." 116 CONG. REC. 35943 (Oct. 9, 1970) (remarks of Sen. Bennett). Given both the secretive nature of the conference and the intervening passage of time, it is impossible to ascertain the conferees' various discussions and agreements about the changes wrought in conference. *Cf. Conroy v. Aniskoff*, 507

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of the violation" language is so compelling that it should easily outweigh all other reasonably applicable canons of construction. For example, one could argue that because Congress created a new statutory right by enacting FCRA, this is "some evidence" that the right was meant to be limited. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998) (discussing this canon). Congress' rejection of the "violation occurrence" language is ample counterweight to any such presumed evidence.

U.S. 511, 518-528 (1993) (Scalia, J., concurring) (questioning the value of perusing through legislative history). Indeed, the only point that is now clear is that Congress changed the threshold of the limitations period from the date of the statutory violation to the date on which "liability arises."

TRW argues alternatively that the 1996 amendments to FCRA – where Congress left Section 618 unchanged – must be interpreted as implied ratification of certain federal appellate decisions that had rejected application to Section 618 of a generally applicable discovery accrual rule. *See* Br. at 39-40 (TRW arguing that "Congress is presumed to be aware of settled judicial interpretation of a statute's language when it reenacts or amends a statute . . . [and] does not change the language."). TRW's implied ratification argument has several defects. First, judicial interpretation of Section 618 was not settled in 1996, when Congress debated various FCRA amendments. To the contrary, a pronounced, inter-circuit split had arisen by 1995. *Compare Clark v. State Farm Fire & Cas. Ins. Co.*, 54 F.3d 669, 672 (10th Cir. 1995) ("We have reviewed the *Hyde* opinion and find it not to be persuasive."), *with Hyde v. Hibernia Nat'l Bank*, 861 F.2d 446, 448-49 (5th Cir. 1988) (applying an "injury occurrence" rule to Section 618), *cert. denied sub nom. Credit Bureau Services – New Orleans v. Hyde*, 491 U.S. 910 (1989). Second, although one may assuredly assume that Congress heeds this Court's final opinions concerning federal laws, one should not assume that Congress heeds the lower courts' decisions for purposes of implied ratification, especially without direct evidence that the Congress considered the issue. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971) (declining to recognize implied ratification of appellate rulings). Finally, there is no indication that Congress, in 1996, ever deliberated about the profound accrual issues that now confront this Court.[22]

22. Recently, this Court noted that questions concerning discovery accrual rules may be "subtle and difficult." *See Klehr v. A. O. Smith*
(Cont'd)

III. SECTION 618 CONTAINS AN ADDITIVE ESTOPPEL EXCEPTION, WHICH OPERATES ONLY IN RARE, EGREGIOUS CASES TO EXTEND – BUT NOT TO TRUNCATE – FCRA'S PRIMARY LIMITATIONS PERIOD.

If Congress had stopped at Section 618's main provision (whereby an action under FCRA may be brought "within two years from the date on which liability arises"), TRW would have little argument supporting its recommended interpretation of Section 618; and a discovery accrual rule would then readily apply. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000) ("Federal courts, to be sure, generally apply a discovery rule when a statute [of limitations] is silent on the issue. . . ."). Congress did not stop, however, at Section 618's general provision. Rather, Congress appended this:

> . . . except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual[,] and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

Careful analysis of the misrepresentation exception's operation leads to an understanding of its compatibility with the "injury discovery" accrual rule. Properly construed, the exception provisionally addresses a particularly egregious and

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Corp., 521 U.S. 179, 192 (1997). Given such profundity, nothing suggests that Congress had these issues firmly in its consciousness as of 1996. *Cf. Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 192 (1971) (squarely rejecting a nearly identical implied ratification argument when applying a discovery accrual rule concerning legal malpractice).

distinct type of misconduct, which – if left unaddressed – could frustrate proper operation of the "injury discovery" accrual rule.

Drawing both parts of its argument from the Third Circuit's opinion in *Houghton v. Insurance Crime Prevention Inst.*, 795 F.2d 322 (3d Cir. 1986) and its progeny, TRW argues that Section 618's "misrepresentation exception" supports its position here. On one hand, TRW argues that reading a discovery accrual rule into Section 618's primary provision would render the "misrepresentation exception" *superfluous*. Br. at 23-25. On the other, TRW argues that Congress' provision of the misrepresentation exception, with its reference to a specific type of discovery, evidences Congressional intent to foreclose application of any other discovery rule to Section 618's primary provision. *Id.* at 20-23. Both components of TRW's legal argument fail.

A. Applying a Discovery Accrual Rule to Section 618's Primary Provision Does Not Render Its Misrepresentation Exception "Superfluous."

In 1986, the Third Circuit declined to apply a discovery accrual rule to Section 618's primary provision. *See Houghton*, 795 F.2d at 325. In rejecting the plaintiff's argument, the *Houghton* court wrote, "If we construe . . . [Section 618] as permitting us to imply a discovery exception to circumstances other than . . . [those which would trigger the misrepresentation exception], we would be rendering *superfluous* the discovery exception which Congress did set forth [i.e., the misrepresentation exception]." *Id.* (emphasis added). TRW similarly argues here that the misrepresentation exception would be rendered superfluous if one were to interpret Section 618 as accommodating any discovery accrual rule. *See* Br. at 23-25; *see also id.* at 24 ("[A] general discovery rule would apply [only] in the same circumstances as the misrepresentation exception[,] and delay the statute of limitations in the same manner as the [misrepresentation] exception's discovery provision, thereby rendering the [misrepresentation] exception superfluous.").

Both the Third Circuit in *Houghton* and TRW here have overlooked the crucial distinction between (1) the initial discovery of an actual injury or violation in the normal situation, and (2) the entirely distinguishable discovery of a reporting agency's subsequent, willful misconduct in the rare and egregious case. As shown below, these two different situations involve the distinguishable discoveries of distinguishable misconduct. The following examples demonstrate the independent and harmonious operation of (1) the "injury discovery" accrual rule applied to Section 618's primary provision, and (2) the misrepresentation exception:

1. Operation of the Injury Discovery Accrual Rule in Section 618's Primary Provision.

Assume that a reporting agency breached its statutory duty of care under FCRA – e.g., breached a consumer's financial privacy – on January 1, 2001. Assume also that the consumer discovers no hint of such misconduct or its ramifications until January 1, 2002 – exactly one year later. Under such circumstances, the "injury discovery" accrual rule will operate to forestall commencement of Section 618's two-year limitations period until such time as the liability first arises (springs up, presents itself) in January 2002. The consumer will therefore have until January 1, 2004 to marshal and evaluate evidence, consult with and secure suitable counsel, and commence suit against the reporting agency. In this scenario, the consumer may commence suit within exactly three years following the reporting agencies' original January 2001 misconduct (the statutory violation).

2. Separate Operation of the Misrepresentation Exception.

Assume additionally that *after* the consumer first discovers, on January 1, 2002, the original, January 2001 misconduct, he demands certain relevant information from the potential defendant reporting agency. *See* 15 U.S.C. § 1681g (consumers' statutory right to demand certain disclosures from reporting agencies). If, several weeks later, still in January 2002, the

consumer receives the demanded disclosures from the reporting agency, but they include a *willful misrepresentation* material to the reporting agency's extant FCRA liability, then the original cause of action will be tolled – indefinitely. In such a situation, where outright deceit intervenes, Congress concluded that a normal accrual rule will no longer adequately protect the consumer. Accordingly, where the premise of the misrepresentation exception is met, the consumer's two-year limitations period will start anew if and when the consumer ultimately discovers the falsity of the reporting agency's intervening misrepresentation.

Thus, if the consumer first discovers the falsity of the reporting agency's misrepresentation on July 1, 2006, the consumer will then have two years following the discovery of this particularly egregious, intervening misconduct to bring suit concerning the seminal January 1, 2001 FCRA violation. The last day to proceed under such circumstances will be on July 1, 2008. That is 7½ years after the reporting agency's seminal misconduct, 6½ years after when liability first "arose" (the date of the discovering actual injury), slightly less than 6½ years after the reporting agency's even more egregious willful misconduct (the intervening misrepresentation), and two years after discovering the willful misrepresentation.

As these two examples demonstrate, Section 618's misrepresentation exception is both compatible with, and entirely distinguishable from, the proper application of the "injury discovery" accrual rule to Section 618's primary provision. Indeed, the misrepresentation exception reflects Congress' insistence that any diligent consumer who *already* suspects a reporting agency's violation, but is then willfully deceived about such matters, does not lose his day in court through the lapse of time while deceived. This misrepresentation exception therefore codifies *equitable estoppel*, which, unlike the "injury discovery" accrual rule, effectively operates to *extend* the limitations period *after* accrual. *See Cada v. Baxter Heathcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990)

(distinguishing the injury discovery accrual rule from equitable estoppel and equitable tolling). Properly understood, discovery accrual rules (other than the extreme "all elements discovery" accrual rule championed by the dissent in *Kubrick*, *see supra* n.10 and accompanying text) do not render equitable estoppel *superfluous*, or vice versa, as the Third Circuit erroneously concluded in *Houghton*. *See Cada*, 920 F.2d at 450-51.[23]

B. *Houghton v. Insurance Crime Prevention Inst.* and Its Progeny Misapplied the Doctrine of *Expressio Unius Est Exclusio Alterius*, Thereby Erroneously Truncating Section 618's Limitations Period.

TRW argues alternatively that Congress' enactment of the misrepresentation exception should be regarded as intent to proscribe application of any discovery rule to Section 618's primary provision, by virtue of the doctrine of *expressio unius est exclusio alterius*. *See* Br. at 21-23. Here again, TRW draws its argument from the Third Circuit's erroneous *Houghton* decision and its progeny. *See* Br. at 12 n.4; *Houghton*, 795 F.2d at 325; *see also Clark v. State Farm Fire & Cas. Ins. Co.*, 54 F.3d 669, 670-72 (10th Cir. 1995) (following and attenuating *Houghton*); *Rylewicz v. Beaton Serv., Ltd.*, 888 F.2d 1175, 1181 (7th Cir. 1989) (same); *Clay v. Equifax, Inc.*, 762 F.2d 952, 961 (11th Cir. 1985) (dismissing plaintiff's discovery accrual argument without explanation). Once again, TRW makes an erroneous argument.

23. As the Seventh Circuit noted in *Wolin v. Smith Barney Inc.*, 83 F.3d 847 (7th Cir. 1996), the "law concerning statutes of limitations fairly bristles with subtle, intricate, often misunderstood issues. . . ." 83 F.3d at 849. Indeed, the only published law review article concerning Section 618 also ignores the distinctly different situations, and erroneously suggests that the "trigger" for applying a discovery rule would necessarily be the exact same "trigger" for applying the willful misrepresentation exception. *See* Martha F. Davis, *Solving Statute of Limitations Problems Under the Fair Credit Reporting Act*, 18 IND. L. REV. 507, 511 n.31 (1985). On that erroneous basis, the article's author concludes that the normal federal discovery rule could not apply to FCRA. *Id.*

Generally, the doctrine of *expressio unius* "is a dangerous master to follow in the construction of statutes." *Custis v. United States*, 511 U.S. 485, 501-02 (1994) (Souter, J. dissenting) (quoting *Ford v. United States*, 273 U.S. 593, 612 (1927) (internal quotations and additional citations omitted)). Recognizing this principle, courts often hold that an enactment of some express legislative exception or exceptions will not necessarily rule out the finding of other implied exceptions. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (noting that *expressio unius* cannot be applied when differing provisions address *different misconduct*). But assuming arguendo that the Section 618's special misrepresentation exception were the singular exception that might alter Section 618's main provision, one should then ask the next question, "an exception to what?"

Answering this, one should naturally examine how Section 618 would operate without the exception. Stripped of the exception, Section 618 would read as follows:

> An action to enforce any liability created under [FCRA] may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years of the date on which the liability arises.

Section 618 (omitting the misrepresentation exception).

Thus, stripped of the exception, what remains of Section 618 is a simple, straightforward statute of limitations. Consistent with federal norms, a discovery accrual rule applies – precisely because Section 618's primary provision remains silent on the issue. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000) ("Federal courts, to be sure, generally apply a discovery rule when a statute [of limitations] is silent on the issue. . . .").[24] Assuming

24. This Court has been reluctant to rule against applying a discovery rule unless the legislative mandate to do so is clear and (Cont'd)

arguendo that a discovery accrual rule should not apply, however, Section 618 – stripped of the misrepresentation exception – still would not express TRW's recommended "violation occurrence" rule. *See Ferguson v. Roberts*, 11 F.3d 696, 705 (7th Cir. 1993) ("The legislative history in 1934 makes it pellucid that Congress included statutes of repose. . . ."); *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d at 1042-43 (10th Cir. 1980) (adopting a restrictive interpretation a statute of limitations because the "section uses strong and unambiguous terms").[25] Therefore, at a minimum, Section 618's main provision requires application of an "actual injury occurrence" rule, such that this Court may nonetheless affirm the court of appeals' judgment. *See supra* pp. 22-29.

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unambiguous, or unless its application would be "*fundamentally inconsistent* with" the related legislative provisions. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (emphasis added). Indeed, in *Lampf*, four dissenting Justices disputed the Court's adoption of the restrictive statute of limitations there, preferring a discovery rule instead. *See id.* at 366-69 (Steven, J., dissenting); *id.* at 372 (O'Connors, J., dissenting) ("[I]t would be most inequitable to hold that a plaintiff has slept on his rights during a period in which . . . he . . . could [not] have known the time limitation that applied to the case." (citations, quotations and alterations in the original omitted)); *id.* at 374-79 (Kennedy, J., dissenting) (recognizing this Court's "obligation to reject a limitation rule that would 'frustrate or significantly interfere with federal policies'" (citation omitted)).

25. The harshest type of statute of limitations (one that commences the limitations period upon a defendant's wrongful act, irrespective of any injury or its discovery) is sometimes called a "statute of repose." *See, e.g., Hinkle by Hinkle v. Henderson*, 85 F.3d 298, 301 (7th Cir. 1996) (discussing the distinction between statutes of limitations and repose); *Bradway v. American Nat'l Red Cross*, 992 F.2d 298, 300-01 (11th Cir. 1993) (same); BLACK'S LAW DICTIONARY 1411 (6th ed. 1990) (defining "statute of repose"). TRW seems to interpret this term broadly, however (*see* Br. at 39), perhaps because this Court has, from time to time, indicated that all statutes of limitations are statutes of repose. (Cont'd)

Looking beyond FCRA itself, the proper construction of Section 618's misrepresentation exception may be further ascertained by examining cases in which federal appellate courts construed similar language in other federal acts. *See ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284-85 (1987) (holding that similar language in two statutes should be afforded the same construction). Indeed, when interpreting a statute that is nearly identical to Section 618, and includes a virtually identical "misrepresentation exception," four circuit courts of appeals (including two that followed *Houghton* into error) found that the statutory language embodies a discovery accrual rule. The lead amongst these cases is *Tijerina v. Walters*, 821 F.2d 789 (D.C. Cir. 1987), which was decided one year after *Houghton*. In *Tijerina*, the District of Columbia Circuit interpreted the Privacy Act's two-year statute of limitations governing personal privacy breaches by the federal government – 5 U.S.C. § 552a(g)(5), which is virtually identical to Section 618. *See* ER 276 (side-by-side comparison of the statutes of limitations).[26]

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See, e.g., Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 136 (1938) ("The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims. . . ."). So as to avoid confusion, Andrews does not use this term of art here, even though it aptly describes TRW's recommended construction of Section 618.

26. The Privacy Act was enacted in 1974, four years after FCRA. *See* Pub. L. No. 93-579, § 2, 88 Stat. 1896 (1974). The only substantial textual difference between the Privacy Act's statute of limitations and FCRA's Section 618 is that the former commences when the "cause of action arises" whereas the latter commences when the "liability arises." *Compare id.* (the Privacy Act's statute of limitations), *with* Section 618. In addition, the Privacy Act does not limit liability for negligent violations to actual damages, as does FCRA. *See* 15 U.S.C. § 1681o. Neither of these two differences supports TRW's argument for a "violation occurrence" rule; nor does either influence whether a discovery accrual rule applies.

Rejecting the federal government's argument that the Privacy Act's limitations period started running upon the mere occurrence of a statutory violation, the court of appeals held that accrual does not occur "until the plaintiff knows or should know of the alleged violation." *Tijerina*, 821 F.2d at 797-98.[27] Specifically, the court of appeals first cited this Court's ruling in *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 427 (1965), for the proposition that Congressional intent must guide the interpretation of a statute of limitations. *See Tijerina*, 821 F.2d at 797. The court of appeals then explained the harmonious operation of the added estoppel exception alongside a general discovery accrual rule, using words that are precisely applicable here:

> Contrary to . . . [defendant's] suggestion, our holding does not read out of existence the . . . [estoppel exception]. That clause extends the normal limitations period in order to ensure that the . . . [defendant] cannot escape liability by purposefully misrepresenting information that could establish that it already has violated the Act. In such cases, the Act allows the period to commence upon actual discovery of the misrepresentation, whereas our holding today is that for other actions under the Act, the period begins [to run] when the plaintiff knew or should have known of the violation. Our holding thus in no way affects the special treatment Congress provided for the particularly egregious cases of [defendant] misconduct singled out in the Act's statute of limitations.

Id. at 798 (citation omitted).

27. Notably, in *Tijerina*, the Court of Appeals ruled that the Privacy Act's limitations period should start running upon discovery of a *violation*, rather than an *injury*. *Compare Tijerina*, 821 F.2d at 797-98 (invoking what is essentially a *violation* discovery rule), *with Rotella v. Wood*, 528 U.S. 549, 554 (2000) (discussing rather an *injury* discovery rule). As this case illustrates, however, a plaintiff's discovery of a privacy violation will usually coincide with the first suffering of injury.

One year later, the Ninth Circuit adopted the reasoning from *Tijerina* in *Englerius v. Veterans Admin.*, 837 F.2d 895 (9th Cir. 1988). *See* 837 F.2d at 897-98 ("We join the Seventh, Tenth, and District of Columbia Circuits in holding that a cause of action under the Privacy Act does not arise and the statute of limitations does not begin to run until the plaintiff knows or has reason to know of the alleged violation."). Importantly, the Ninth Circuit cited *Englerius* (and thus, implicitly, *Tijerina*) as the basis for its holding below. *See* PA 6a (opinion below, citing *Englerius*). Therefore, although the court of appeals' opinion below is terse, it incorporates by reference the logic from *Tijerina* in rejecting the *expressio unius* argument that TRW presses here.[28]

Finally, TRW's *exclusio unius* argument concerning the misrepresentation exception begs a compelling question. Why would Congress give consumers two full years in which to file suit after discovering the falsity of a misrepresentation that had interrupted the running of an earlier limitations period, but not give consumers two full years in the first instance? Common sense suggests that Congress would afford consumers two full years to marshal a federal lawsuit after discovering either type of misconduct.

28. Even though the Privacy Act's statute of limitations, 5 U.S.C. § 552a(g)(5), is nearly identical to Section 618, both the Seventh and Tenth Circuits followed *Houghton* in refusing to apply any discovery accrual rule to Section 618. *See supra* p. 34, (discussing *Rylewics* and *Clark*). These same circuit courts of appeals indeed applied a discovery accrual rule, however, to the virtually identical Privacy Act limitations provision. *See Bowyer v. United States Dept. of Air Force*, 875 F.2d 632, 635-36 (7th Cir. 1989); *Bergman v. U.S.*, 751 F.2d 314, 316 (10th Cir. 1984), *cert. denied*, 474 U.S. 945 (1985). Given concern for sovereign immunity, there is no reason why virtually identical statutes of limitations should be interpreted to hold open the door for suits against the federal government for privacy breaches, while closing the same door for similar suits against private corporate citizens.

IV. ALL RELATED FCRA PROVISIONS SUPPORT APPLICATION OF THE "INJURY DISCOVERY" ACCRUAL RULE TO SECTION 618.

Given the history of Section 618, its plain language, and its interplay with FCRA's provision for civil liability in cases of negligent noncompliance, there should be no remaining doubt about whether a FCRA cause of action accrues before an actual injury is "suffered." Still further inspection of FCRA reveals that its related statutory provisions, 15 U.S.C. §§ 1681m(a) (hereinafter the "notice" provision) and 1681g(a) (hereinafter the "access" provision), support application of the "injury discovery" accrual rule to Section 618.

First, under FCRA's basic "notice" provision, any entity that subscribes to consumer reports must inform a consumer promptly (1) when it takes any adverse action based upon a consumer report (*e.g.*, denies the consumer credit), and (2) of the name and address of the reporting agency supplying the report. *See* 15 U.S.C. § 1681m(a); *see also* OBA 7a (the statute in effect before 1997). When functioning properly, this "notice" provision effectively alerts the consumer to the fact that an adverse action (*e.g.*, a credit denial) was based upon a particular reporting agency's disclosure, perhaps due to its failings.

Second, under FCRA's "access" provision, any reporting agency must disclose to any inquiring consumer relevant information in its files, including all non-medical information and the identities of recent recipients of its consumer reports. *See* 15 U.S.C. § 1681g(a); *see also* OBA 5a-6a (the statute in effect before 1997). This "access" provision logically complements the "notice" provision, and allows the diligent consumer to inform himself further by discovering the specified matters.

When discussing these FCRA "notice and access" provisions in its Brief, TRW exaggerates the consumer benefits of these provisions, and ignores their basic limitations.

Specifically, TRW argues that these two provisions afford consumers "the means to discover quickly ... any inaccurate information in their files that harmed them." Br. at 27-28. From there, TRW concludes that the "notice and access provisions . . . ensure that ... consumers will discover *most* serious claims . . . well within the limitations period." *Id.* at 31 (emphasis added) (effectively admitting that some consumers will discover serious FCRA claims outside of TRW's recommended limitations period). Thus, according to TRW, Section 618 must be read as an extremely restrictive statute of limitations which starts running immediately upon a statutory violation. *See generally id.* at 29-32 (arguing that FCRA's "notice and access" provisions amply protect consumers). TRW's reliance on these two provisions is misplaced.

On the one hand, TRW overstates the effectiveness of the "notice" provision. In reality, victims of identity theft and other improper privacy breaches receive no timely notices of any kind. Here, for example, TRW breached Andrews' financial privacy four times before May 31, 1995. *See supra* p. 5. Andrews received no notice about any of these privacy breaches, however, until after she sought to refinance her home – more than ten months after the first violation. *See supra* p. 6-7. Most ironically, it was *the Impostor* (as the would-be credit applicant), rather than Andrews, who received any required notice whenever the Impostor suffered an "adverse action." *See* 15 U.S.C. § 1681m(a) (requiring that the credit applicant (here, the Impostor) was to be informed each time that she was denied credit "wholly or partly because of information contained in a [TRW] consumer report. . . .").

On the other hand, TRW concedes that FCRA's "access" provision merely enables consumers to "identify improper disclosures quickly *once they have reason to suspect such a disclosure*." Br. at 28 (emphasis added). While victims of identity theft are always desperate for information *once they have reason to suspect* that someone is misusing their good

name and creditworthiness, they often have no basis for suspicion for many months.[29]

The second major problem with TRW's reliance upon the "notice and access" provisions is that the resulting revelations, once they reach the proper consumer, help the consumer far less than TRW implies. For example, TRW argues that FCRA's "notification and access provisions work together to enable consumers to discover *violations* of the Act in a timely fashion." Br. at 27 (emphasis added). In truth, these provisions do no more than put a consumer on notice of a *possible* violation. *See Wolin v. Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) (accrual occurs upon notice of a *possible* violation); *Cada v. Baxter Healthcare Corp.*, 920 F.2d at 450 (same).

FCRA is not a strict liability statute. *See Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). Instead, FCRA requires reporting agencies to comply with professional negligence standards that involve various rules of reason and reasonableness. *See id.*; *see also* 15 U.S.C. § 1681e (standards of care). Consequently, a FCRA *violation*, which is necessary for FCRA liability to exist, is neither ascertained nor

29. TRW intimates that each consumer should pay numerous reporting agencies annually to monitor their files. *See* Br. at 27, 28 n.12. Andrews acknowledges that Congress recently placed a statutory limit upon the fees that reporting agencies can charge for such supposed privileges. *See* 15 U.S.C. § 1681j(a)(1)(A). This limitation does not mean, however, that Congress intended to impose upon each of approximately 190 million consumers (tens of millions of whom live near or in poverty) the obligation to pay to *each* reporting agency $8, indexed for inflation – as an annual charge for maintaining FCRA privacy rights. Indeed, TRW suggests that 190 million consumers should be expected to provide a combined total of $1.52 billion (190 million x $8 = $1.52 billion) annually to each and every individual reporting agency, multiplied by an inflation index. Here, however, even if Andrews had sought to view her TRW credit file annually, as TRW now urges, she might not have discovered her plight any sooner than she did. Indeed, just over ten months elapsed between TRW's first privacy breach concerning her and when she discovered it. *See supra* pp. 5-7.

imminently provable by merely discovering the existence of credit reporting inaccuracies, improper privacy breaches, or injury and causation. Rather, any potential plaintiff would need to determine additionally whether the defendant violated the relevant professional standard of care.[30] *See Guimond*, 45 F.3d at 1333; *cf. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 376 (Kennedy, J., dissenting) (suggesting that strict liability provisions are more amenable to restrictive statutes of limitations). Therefore, a typical FCRA plaintiff may need nearly two full years following the onset and discovery of actual injury before being in a reasonably informed position to bring a FCRA suit in federal court. *Cf.* FED. R. CIV. P. 11(b) (requiring well-founded beliefs concerning relevant facts and law when filing complaint, or risk sanctions).[31]

Finally, FCRA's "access" provision requires reporting agencies to confess to inquiring consumers certain limited information about their consumer reports issued during the two

30. Specifically, FCRA's "notice" and "access" provisions provide a consumer with no relevant information concerning reporting agencies' *duty of care* or compliance *vel non* with FCRA's many reasonableness standards. *See* 15 U.S.C. § 1681e (FCRA's reasonableness standards); 15 U.S.C. § 1681b(a)(3) (FCRA's reasonable belief standard). In comparison to medical malpractice, for example, ascertaining negligence in the consumer credit reporting context requires piercing a monolithic, secretive industry dominated by an oligopoly. *Cf. United States v. Kubrick*, 444 U.S. 111, 123-24 ("If there exists in the [relevant] community . . . a generally applicable standard of [medical] care, we see no reason to suppose that competent advise would not be available to the [diligent] plaintiff. . . .").

31. As this case demonstrates, even *after* a consumer discovers that she is a victim of identity theft, and receives the required disclosures (free of any misrepresentations), the consumer might still be confused for a long time. Understandably, it could take many months to determine who is most responsible for what particular wrongdoing (the impostor, the defrauded creditors, their harassing collection agents, and/or the facilitating, slack reporting agencies). *Cf. Kubrick*, 444 U.S. at 123-24 (*after* discovery, the plaintiff must *then* begin to utilize the prospective limitations period to investigate the possibility of actionable negligence).

years preceding the consumer's inquiry (or, depending upon the recipient's apparent use of the report, less than two years). *See* Br. at 31-32 (discussing FCRA's "access" provision). TRW points to the relatively short extent of consumer hindsight provided by these obligatory disclosures, and argues that Congress must have had little concern for consumers who suffer privacy breaches. *See id.* To the contrary, the fact that Congress reasonably limited the reporting agencies' self-confession obligation *supports* application of the "injury discovery" accrual rule here, and tempers the impacts about which potential defendants might legitimately complain.

By limiting to two years the time in which consumers may request information about agencies' anecdotal, historical sales activities, Congress provided that repose will usually be achieved promptly. Indeed, FCRA's maximum two-year, *retrospective*, self-confession requirement combines with Section 618's two-year, *prospective* limitations period to assure that the vast majority of FCRA suits will be brought within four years following any statutory privacy violation. Four years in the ordinary case is not so short as to indicate that Congress had no concern for consumers. Nor is it so long that the policies generally underpinning statutes of limitations could be offended by application of the "injury discovery" accrual rule here. After all, *four years* from the date of the statutory violation is still more protective of the industry than the legislation preferred by the House, with its *five-year* limitations period, keyed to the date of violation. *See supra* pp. 26-28.

V. SOUND POLICY SUPPORTS APPLICATION OF THE INJURY DISCOVERY RULE TO SECTION 618.

TRW makes two main policy arguments in its Brief. First, TRW claims that, to save costs, reporting agencies continually destroy certain digital information when it becomes two years old. Thus, TRW suggests that interpreting Section 618 expansively would force agencies to store massive amounts of data for longer periods of time, at great and undue expense.

See Br. at 30-31. Given the plummeting prices now being charged for a "terabyte" (one trillion bytes) of data storage capacity, however, reporting agencies have no cost justification for destroying all historical records of their consumer reports so quickly. *See* ER 287-88.[32]

Moreover, TRW acknowledges that certain states (e.g., California, Ohio and Georgia) have already subjected reporting agencies to a discovery accrual rule. *See* Br. at 33-34. Because TRW's successor in interest, Experian, and its credit reporting brethren do business in those states, one can assume that they have in place procedures aimed at complying with those states' discovery accrual rules.[33] Thus, affirming the "injury discovery" accrual rule here will not add significantly to the industry's data-keeping burdens. Indeed, apart from occasionally being required to defend the reasonableness of procedures in place at a given time (and, perhaps, pay damages), no substantial, additional financial burdens would befall reporting agencies if this Court were to apply the "injury discovery" accrual rule here or otherwise affirm the judgment below.[34]

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32. The Internet routinely records plunging, easily affordable prices for a "terabyte" (1,000,000,000,000 bytes) of data storage. *See, e.g.*, Press Release, Business Wire, Snap Appliances Announces Terabyte-class Storage Appliance at CeBIT (Mar. 19, 2001), at http://biz.yahoo.com/bw/010319/0219.html (last visited May 26, 2001).

33. As TRW noted in its brief, its former credit reporting division continues to operate under new ownership *sub nom.* Experian Information Solutions, Inc, having been sold by TRW in 1996. Br. at 2 n.2. Experian is surely the real party in interest here – with or without its fellow credit reporting titans.

34. Even if one assumes that it will cost reporting agencies materially more money to start complying with FCRA and occasionally defend themselves for allegedly failing to do so, that is seemingly what Congress desired. When enacting FCRA, Congress expressed the need for "reporting agencies [to] exercise their *grave responsibilities* with fairness . . . and a respect for the consumer's right to privacy. 15 U.S.C.

(Cont'd)

Second, TRW fears that applying the "injury discovery" accrual rule to Section 618 will upset the delicate balance struck by Congress, and significantly "increase[] the risk of litigating stale claims." *See* Br. at 29-30. TRW thus implies that reporting agencies and federal courts will be overtaxed by cases in which the relevant facts are unduly obscured by time. In other contexts, however, members of this Court have recognized that any court may, in the very rare case where warranted, find gross laches to bar an ancient and problematic claim, even if the plaintiff is guilty of no inexcusable delay.[35] Thus, in an extremely tardy case (i.e., where tremendous prejudice befalls the defendant or the court system), gross laches will trump the "injury discovery" accrual rule. TRW's fear of the truly ancient case is therefore unfounded. Here, specifically, no laches can be found – gross or otherwise. Indeed, TRW did not even mention laches among the eight affirmative defenses set forth in its Answer filed in the district court. *See* JA 29-31. Surely, the omission is because Andrews can be faulted for no unreasonable delay, and TRW can claim no prejudice.

(Cont'd)

§ 1681(a)(4) (*see* JA 32). Moreover, Congress' stated purpose in enacting FCRA was to require reporting agencies to function "in a manner which is fair and *equitable* to the consumer, with regard to the *confidentiality* . . . and proper utilization of" credit histories. 15 U.S.C. § 1681(b) (emphasis added) (reprinted at JA 32-33).

35. *See, e.g., County of Oneida, New York v. Oneida Indian Nation*, 470 U.S. 226, 266 (1985) (Stevens, J., concurring and dissenting) (joined by then Justice Rehnquist) (discussing gross laches findings in truly ancient cases); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 378-79 (1991) (Kennedy, J., dissenting) (joined by Justice O'Connor) (discussing the possibility that, in "the extreme case," a finding of gross laches could trump the tolling principle, and concluding that a "3-year absolute bar . . . simply tips the scale too far in favor of wrongdoers").

CONCLUSION

For all of the reasons set forth above, Andrews respectfully requests that this Court affirm the judgment of the Court of Appeals for the Ninth Circuit.

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